

**\*OGC Has Reviewed\***

Chief, Supply Branch SSS

10 November 1949

Legal Staff

Contractor's Relief From Liquidated Damages--

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1. Your memorandum of 7 November 1949 requested our opinion of a request from the [REDACTED] to waive the liquidated damages provided for in Article 6 of subject contract.

2. The contract provides for construction of ninety-eight units after two initial prototype models have been accepted. In constructing the additional units, the contractor obtained certain defective parts from a subcontractor, and it was necessary to disassemble the units, return the parts, and obtain the proper replacements. The delivery date was exceeded to the extent that liquidated damages now amount to almost the full contract price.

3. We do not understand the statement in paragraph 5 of the contractor's letter regarding a "specification called for by the Signal Corps". The units were considered defective in failing to meet this specification. There are no Signal Corps standards contained in the contract or requisition, and there is no reference to such in the related correspondence. Unfortunately for the contractor, this does not appear to be particularly pertinent. Whether or not he was obligated under the contract to meet such standards, the delivery date was exceeded and the failure was not based on any of the extenuating causes indicated in Article 6 "Delays-Liquidated Damages".

4. A recent opinion of the Comptroller General is controlling. In a similar situation (see 28 Comp. Gen. 435), a request for relief from the assessment of liquidated damages was denied. Without repeating the various authorities cited in that opinion, it appears well-settled that reasonable agreements for liquidated damages are upheld and it is immaterial that no actual damage can be shown to have resulted from the breach. He points out that a provision for liquidated damages is only unenforceable when it constitutes a penalty rather than compensation for damage, but in order for a case to fall in this category "it must appear that the fixed sum stipulated is plainly without reasonable relation to any probable damage which can follow from a delay of performance." (Underlining ours). It does not appear that there was any objection to the rate of liquidated damages at the time the contract was executed, or that the parties were unaware of the results which would follow a failure to make timely delivery. The obligation to enforce the payment of damages has accrued to the Government, and the obligation can be waived only by the General Accounting Office. In view of this decision, relief appears so unlikely that it is not recommended that the case be submitted to the Comptroller General for an additional opinion.

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5. The contractor's plight is certainly unfortunate, but it is part of the risk of doing business. If he was unable to obtain an adequate indemnification from his subcontractor for a loss of this type, he did so with his eyes open and should have been aware of the hazard.

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